

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

LOUIS KISLING,
Appellant,

v.

DECISION AND ORDER

SCHOOL DISTRICT NO. 2A(C),
PHILLIPS COUNTY, MONTANA,

OSPI 14-81

Respondent.)

This is an appeal from the Findings of Fact, Conclusions of Law and Order rendered by the County Superintendent of Schools, Phillips County, Montana.

Louis Kisling, hereinafter referred to as the Appellant, was employed by School District No. 2A(C) Board of Trustees, Dodson, Montana, hereinafter referred to as Respondent, for twelve years. Appellant was an elementary classroom teacher and later a high school teacher and guidance counselor. Since 1974, Respondent became aware of problems with Appellant's performance as a teacher. During the school years 1979-80 and 1980-81, Appellant's performance problems became acute. On March 13, 1981, the District Superintendent recommended Appellant's contract for 1981-82 not be renewed. Notice of a hearing on the recommendation was sent to Appellant. On March 25, 1981 a hearing was held by the Respondent on the recommendation that Appellant's contract not be renewed. Respondent, through resolution, decided not to offer or renew Appellant's contract. Later, Appellant requested a statement of reasons for his nonrenewal. On April 7, 1981, Respondent provided the statement of reasons to Appellant.

On April 14, 1981, Appellant requested a hearing before Respondent. Appellant and Respondent stipulated that the issue would be taken directly to the county superintendent without another board hearing to avoid the delay of another hearing before Respondent on the same matter as the March 25, 1981 hearing. Later Appellant insisted that he did not waive his right to a second hearing and therefore requested another hearing before the board. On June 19, 1981, a second hearing before Respondent was held on the decision not to renew

Appellant's contract. On June 22, 1981, Respondent affirmed its decision not to renew Appellant's contract for the 1981-82 academic year. Appellant filed an appeal with the Phillip's County Superintendent of Schools pursuant to Section 20-3-107, MCA. The county superintendent held a hearing on September 23, 1981. Appellant and Respondent were represented by counsel. The county attorney advised and was accessible to the county superintendent during this hearing. Both parties had the opportunity to present and cross-examine witnesses and briefs were filed with proposed findings.

On December 1, 1981, the county superintendent entered Findings of Fact, Conclusions of Law and Order and affirmed the decision to terminate Appellant. It is from those Findings of Fact, Conclusions of Law and Order that Appellant presents this case.

Respondent listed the following reasons for nonrenewal of the contract:

1. Louis Kisling is unable to maintain classroom discipline resulting in the disruption of classes of other teachers, destruction of school property and an extremely poor learning environment in his classes.
2. Louis Kisling fails to adhere to school policies concerning student discipline, student dismissal times, student grading, study hall and library policies, absences from classrooms without notice to school administration, homework assignments and he generally exhibited an uncooperative and indifferent attitude concerning school administration directives.
3. Louis Kisling is without the ability to develop and foster adequate professional relationships with the other members of the faculty by reasons of his confrontations with other faculty members in the presence of students.
4. Louis Kisling failed to respond to numerous attempts by the school administration to help correct his performance problems over a period of several years and in intensive effort by Martin Dwyer during the first nine weeks of the 1980-81 school year.

Appellant contends the county superintendent erred in giving too little weight to Kisling's status as a tenured teacher. Recently, in

Yanzick v. School District No. 23, Mont. ____, __P.2d__, 39 St. Rptr. 191 (1982), the Montana Supreme Court mandated that the county superintendent follow the Montana Administrative Procedures Act in contested cases such as this school controversial appeal. The state superintendent, since the commencement of his administration and prior to the Yanzick decision, has followed the Montana Administrative Procedures Act. (See Sorlie v. School District No. 2, Simonsen v. School Board, Knudsen v. School Board, and Hiller v. School Board.)

Section 2-4-711(2), MCA, allows an Appellate Judicial Review body to reverse or modify the decision if substantial rights of the Appellant have been prejudiced because of the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (g) because findings of fact, upon issues essential to the decision, were not made although requested.

The district court and the state superintendent may not substitute their judgment for that of the county superintendent as to the weight of evidence on questions of fact. The Supreme Court refers to the county superintendent appropriately as the lower appellate tribunal. This lends weight to the fact that the county superintendent's hearing process is crucial, perhaps the most crucial point in school controversial cases. The state superintendent, in turn, must base his conclusions on a review of the printed record, without the benefit of listening to and observing the demeanor, conduct and testimony of witnesses.

I may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

STATUS OF TENURED TEACHERS

I have previously recognized that tenure is a substantial, valuable and beneficial right. (See James C. Holter v. Valley County School District No. 13, Irene D. Sorlie v. School District No. 2, Yellowstone County and In the Matter of the Appeal of Board of Trustees of School District No. 9, Opheim, Montana, Decision and Order, November 19, 1981.) In the Opheim case, a nonrenewal of a tenured teacher's contract was before this state superintendent. There was insufficient evidence on the record and inadequate basis for the charges for nonrenewal of that teaching contract to overcome the substantial, valuable and beneficial right. Further, in that case I found that the hearing examiner's Findings of Fact, Conclusions of Law and Order was not acted upon arbitrarily or capriciously or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Further, vague allegations without specific facts that the teacher's program was not improving was not sufficiently documented as to allow this state superintendent, under the standard of review, to reverse the decision of the hearing examiner. In that opinion, I also addressed the concerns of the school board that a decision reversing their decision would effectively strip its power to operate its local school system. I disagreed. I maintained then, as I do here, that the local school district has an obligation to control the activities of its school and further, if a school board maintained proper actions and procedure against a tenured teacher as outlined in that case, with the application of the test promulgated in Yanzick, that the parameters and the correct process may be established in allowing a school board to select not to renew a tenured teacher's contract, and have that decision upheld.

THE YANZICK TEST

In Yanzick, the Supreme Court dealt with the nonrenewal of a contract of a tenured teacher. Among the issues decided by the Supreme Court was a standard of review to be applied by the county superintendent and other appellate ruling bodies including this state superintendent. Yanzick's contract was not renewed for the 1977-78 school year because the board of trustees, after a hearing, found that his living with a woman out-of-wedlock was common knowledge to his students, his discussion of abortion in the classroom, and his display

and use of human fetuses demonstrated his lack of fitness as a teacher. Numerous parental complaints, and the public knowledge of his living arrangement which was discussed in the classroom were all found to have a negative influence on the formation of moral judgments by his students. The Supreme Court recognized as well the ultimate power of the local board of trustees to govern the district, recognizing both the statutory and constitutional rights vested in the local board to supervise and control their schools, including the hiring and firing of teachers. The court quoted a Montana constitutional delegate in part:

...I feel, therefore, that we should give constitutional recognition and status to the local boards to--first of all, allay the fears which have been expressed, which I think are well-founded concerning the preservation of local autonomy...

Further, the Court in Yanzick citing Kelsey v. School District No. 25, 84 Mont. 453, 276 P.2d (1929) stated:

A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote; and, presumably, are chosen by reason of their long standing in the community, sound judgment, and their interest in the educational development of the young generation which is so soon to take the place of the old.

Further, the Supreme Court said:

In emphasizing that a teacher's work is a very sensitive area, and that school authorities have the duty to screen teachers as to their fitness to maintain the integrity of schools.

In Abler v. Board of Education, 342 USC 485 (1952), the United States Supreme Court said:

A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.

The court went on to hold that the standards of nonrenewal of a tenured teacher at the end of a contract is "good cause," and not the narrow standards described in Section 20-4-207, MCA.

BOARD'S RESPONSIBILITY TO FOLLOW THE LAW

An examination of the Findings of Fact made by the county superintendent in this case demonstrates the ability of the school board to follow the case law and proper procedure. The record indicates that the school board essentially did their homework as outlined by case law to establish good cause. Specifically:

1. The board set out not only to produce allegations, but to substantiate in detail, particulars through observation over an extended period of time as to the failure of a tenured teacher to maintain particular standards.
2. The teacher, in turn, was notified through several evaluations, had the ability to respond to the evaluations, and a period of time to seek assistance to re-establish his standard.
3. The board listed specific reasons for nonrenewal of teaching contracts.
4. The board provided appropriate procedures leading to Appellant's nonrenewal in establishing the process outlined by both the statute and the Yanzick decision.
5. The evidence produced at the hearing in support of the reasons given by the board was exhaustive, detailed, substantiated both by oral testimony, documentation, and personal observations of superiors.

The county superintendent exercised his responsibilities to hear and decide controversies and to make the decisions based upon the facts established at the hearing. The bearing was de novo before the county superintendent. Specific findings made extensively are in part, as follows:

- a) Inability or unwillingness to maintain classroom discipline as observed by Mr. Piippo, Superintendent in 1979-80, and Mr. Dwyer, Superintendent in 1980-81, and Mr. Huber, Mrs. Edmister and Mrs. Rapp, other teachers in the school during the same two academic years. The observation of Mr. Kisling and his classes by these people included: so much noise coming from Mr. Kisling's classroom or study hall that it would be necessary for other teachers

to close their classroom doors so their classes would not be disrupted; observing students in Mr. Kisling's classes pestering each other, reading novels, paperbacks, and magazines in class; writing personal letters and notes and passing them back and forth during class; many students talking at once, having private conversations; students leaving the classroom without permission before being dismissed; students throwing objects at other students, students being allowed to sit on desk tops and chair backs, and Mr. Kisling's failure to follow through on threats of discipline to the students for these activities during class.

b) Inability or unwillingness to adhere to school policies and procedures and administrative directives as observed by Mr. Ken Piippo and Mr. Martin Dwyer including his inability to control the defacing of school desks by students and damage to the backs of student desks resulting from students sitting on the desk backs after receiving repeated instructions from Mr. Piippo and Mr. Dwyer to control the situation; inability and apparent unwillingness to enforce the library policy concerning the number of students in the library at one time and the policy on student sign-outs from the study hall. In this respect, Mr. Kisling testified that, contrary to school policy as set forth in the teachers handbook, he did not feel that he had to accept responsibility for the number of students in the library during his study hall periods. Mr. Kisling also failed to come to a school Christmas program of only one hour duration when specifically instructed to come and which was attended by all other teachers and was an important program for school-community relations. Mr. Kisling was frequently absent from his classroom and study halls during class periods leaving his class unattended by his own admission--in violation of the school policies as set forth in the teachers handbook. Mr. Kisling failed to follow the school "pink slip system" for student discipline.

c) His inability to develop and foster adequate professional relationships with the other faculty members as evidenced by his making disparaging remarks about other teachers in front of the students--referring to Mr. Huber as a tattletale, referring to Mr. Robinson as incompetent, expressing his unwillingness to supervise the library to Mr. Dwyer--all in the presence of students; by acting as an advocate for students in disciplinary situations including a note-writing incident involving Mrs. Edmister, and a refusal of a student to respond to instructions from a teacher involving Mr. Robinson; making disparaging remarks to Mrs. Rapp in study hall where some of his students were causing disruption. Mr. Kisling's attitude in student disciplinary matters as evidenced by the testimony including his own was that the student was presumed to have done nothing wrong, and teacher involved was at fault in the incident. He would apologize "for having to put" the student "through this" etc. Elementary classroom teachers would not consent to Mr. Kisling talking to their students about careers because every time something like that had been tried with Mr. Kisling, it would take the teachers the remainder of the day to get the classes back under control again.

Further, the county superintendent held that the incidences of Appellant's inadequate performance were not isolated, but were chronic, gradually worsening problems over a number of years which became intolerable during the 1979-80 and 1980-81 academic years. The school administration quite properly and meticulously made a concerted effort during the 1979-80 and 1981-82 school year to assist Appellant in correcting his performance problems, including evaluations, informal discussions and a written itemization at the end of the 1979-80 academic year of deficiencies in Appellant's performance. Appellant verbally agreed to make the necessary changes in his job performance but was unwilling or unable to follow through with these changes.

The county superintendent also addressed the concern of Yanzick and other decisions of the effectiveness of teaching in the classroom. The ultimate test in many of these decisions is the effect the performance or non-performance of a teacher has upon the students in this state. In that capacity, the county superintendent found that:

In order to provide the proper learning environment for students in the classroom setting, it is essential that the attention of students be maintained, which requires discipline in the classroom and respect for the teachers by the students.

Mr. Kisling was unable to maintain classroom discipline as noted above and did not have the respect of his students as evidenced by their disregard for him in the classroom and disparaging remarks they made inside and outside the classroom.

In order for the school as a whole to properly serve the students enrolled, the faculty and staff must be able to work together as a cohesive unit to maintain the proper learning environment. Discipline problems in one class cannot be allowed to affect other classes. School policy must be uniformly applied to all students by **all** faculty members. One faculty member undermining disciplinary activities of another faculty member cannot be tolerated. **All** faculty members must show respect for one another and disparaging remarks about one faculty member by another in front of students cannot be condoned or tolerated as the result would be complete disruption of the educational environment and destruction of the student-teacher relationship. (Findings of Fact, Conclusions of Law and Order.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Conclusion reached by the county superintendent that the nonrenewal of Appellant's contract as a teacher in School District No.

2A(C), Dodson, Montana by the board of trustees is proper as the same is based upon reasons directly related to Appellant's refusal or inability to perform the services for which he was hired in a competent and professional manner, and the reasons given him for his non-renewal are supported by substantial credible evidence. From the facts presented by this case, the Respondent had ample evidence upon which to base its decision not to renew Appellant's contract. The county superintendent has more than sufficient evidence in the record to justify her conclusion of affirming the Respondent's action. There was abundant testimony of Appellant's problem of discipline as described by several individuals. Appellant's inability or unwillingness to adhere to school district policies, procedures and administrative directives was also described by several individuals. Appellant's failure and inability to foster and develop adequate professional relationships with other staff members occurred on several occasions, and he did not deny such instances; his inadequate performance was not an isolated incident, but was chronic and gradually worsening over the years. Such proportions the county superintendent found, and I affirm, is good cause established by case law. The record is clear that the administration made a concerted effort during the 1979-80 and 1980-81 school years to assist Appellant in correcting his performance problems, including formal evaluations and informal discussion in a written itemization appended to this contract at the end of the 1979-80 academic year. It is generally not one isolated act which provides the justification of nonrenewal of a contract of a tenured teacher, but usually a series of problems of increasing severity over a period of time. (State ex rel. Cochrane v. Peterson, 294 N.W. 2d 377 (1980), Conder v. Board of Directors of Windsor School, 567 S.W. 2d 377.) The problem that the Dodson school system experienced with Appellant as it is clear from the record is the same as problems experienced in cases in other states. As the record indicates, there were many instances where Appellant's inability to maintain classroom discipline, his inability to get along with his fellow teachers, and his failure to carry through administrative directives created and substantiated good cause for the Respondent's decision not to renew his contract. The conclusions the county superintendent reached on the evidence in total shall not be disturbed.

SCHOOL ADMINISTRATION'S RESPONSIBILITY TO INSURE COMPETENCY OF
TEACHING

The county superintendent made specific findings that no evidence of intent to wrongfully deprive Appellant of his position was offered other than Appellant's own personal feelings. All teachers in the system were frequently visited by the school superintendent

The responsibility of the school administration as agents for the school board is to assist teachers in their professional development. School administrators also have a duty and a responsibility to insure competency in the classroom. Evidence indicated in this case that the superintendents for a span of several years attempted to identify specific problems, evaluate those problems, recommend alternative courses, and assist in the effectiveness of teaching, ultimately to the benefit of the students in the classroom. The attention given to a teacher in this case provides a good example of an attempt to correct a problem in a proper manner. The administration as well as the teacher knew at all times what his status was, what his performance evaluation was, and what was needed to correct the performance evaluation. The teacher was aware that evaluation was continuous and occurring without surprise. Further, findings made indicated that other teachers were also frequently visited by the superintendent. Ultimate responsibility of insuring that professional development continues lies both with the board and school administrators. A consistent, up-front approach through written evaluation and response is ultimately the final answer as to whether a teacher may succeed to improve his/her teaching abilities in the classroom. In this case, the teacher failed. Affirmed.

DATED April 6, 1982.